

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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MARTIN JONATHAN	:	16-CV-04756 (NGG)
BATALLA VIDAL, ET AL,	:	
	:	
Plaintiffs,	:	
	:	United States Courthouse
	:	Brooklyn, New York
-against-	:	
	:	
KIRSTJEN M. NIELSEN, ET AL.,	:	Tuesday, January 30, 2018
	:	11:00 a.m.
Defendants.	:	
	:	
	:	

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TRANSCRIPT OF CIVIL CAUSE FOR MOTION HEARING  
BEFORE THE HONORABLE NICHOLAS G. GARAUFIS  
UNITED STATES SENIOR DISTRICT JUDGE

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Proceedings recorded by mechanical stenography, transcript  
produced by Computer-Assisted Transcription.

1 THE COURT: Please be seated.

2 THE COURTROOM DEPUTY: Civil cause for a motion  
3 hearing.

4 Counsel, please state your appearances.

5 MR. CHEN: David Chen, law student intern,  
6 Jerome N. Frank Legal Services Organization, for Batalla Vidal  
7 Plaintiffs.

8 MR. WISHNIE: Michael Wishnie, Yale Law School, for  
9 Batalla Vidal Plaintiffs.

10 MS. TUMLIN: Good morning, Your Honor, Karen Tumlin  
11 with the National Immigration Law Center for the plaintiffs.  
12 I'd also like to introduce the named plaintiffs who are in the  
13 courtroom today, Martin Batalla Vidal.

14 THE COURT: Just stand up please when your name is  
15 called.

16 MS. TUMLIN: Antonio Alarcon.

17 Eliana Fernandez.

18 Carlos Vargas.

19 And Carolina Fung Feng.

20 THE COURT: Welcome to you all.

21 MR. COX: Good morning, Your Honor, Justin Cox,  
22 National Immigration Law Center, for the Batalla Vidal  
23 Plaintiffs.

24 MS. JOACHIN: Good morning, Your Honor, Mayra  
25 Joachin, National Immigration Law Center, for the Batalla

1 Vidal Plaintiffs.

2 MS. ORIHUELA: Good morning, Your Honor, Marisol  
3 Orihuela, Jerome N. Frank Legal Services Organization, for the  
4 Batalla Vidal Plaintiffs.

5 MR. FOLETTA: Good morning, Your Honor, Scott  
6 Foletta of Make the Road New York for the Batalla Vidal  
7 Plaintiffs.

8 MR. AHMAD: Good morning, Your Honor, Muneer Ahmad,  
9 Jerome N. Frank Legal Services, for the Batalla Vidal  
10 Plaintiffs.

11 MS. TAYLOR: Good morning, Your Honor, Abigail  
12 Taylor from the State of Massachusetts for the Plaintiff  
13 States.

14 MS. ROSADO: Good morning, Your Honor, Lourdes  
15 Rosado from the New York Attorney General's Office also on  
16 behalf of the Plaintiff States. Good morning.

17 MS. MELODY: Good morning, Colleen Melody from the  
18 State of Washington on behalf of the Plaintiff States.

19 MS. NADEAU: Good morning, Genevieve Nadeau from the  
20 Commonwealth of Massachusetts on behalf of the Plaintiff  
21 States.

22 THE COURT: Very well. Good morning to you all.  
23 For the defendants?

24 MR. SHUMATE: Good morning, Your Honor, Brett  
25 Shumate from the Department of Justice on behalf of the United

1 States. I'd like to introduce the rest of our table here:  
2 Stephen Pezzi from the Department of Justice, he's going to be  
3 taking the first two segments of the argument, I'll take the  
4 third part and be happy to answer any of the other questions  
5 the Court may have; John Tyler, Brad Rosenberg, Joe Marutollo  
6 from the U.S. Attorney's Office here, Kate Bailey, Rachel  
7 Westmoreland, and I'd like to introduce Chad Readler.  
8 Mr. Readler is the Acting Assistant Attorney General for the  
9 Civil Division of the Department of Justice who wanted to be  
10 here today.

11 THE COURT: Nice to meet you. Congratulations.

12 Very well. Before going into the argument, I'd like  
13 to ask the question as to the cert petition that's pending  
14 before the U.S. Supreme Court in DHS versus Regents of the  
15 University of California. If the Supreme Court were to grant  
16 cert, should this Court stay any decision on any of these  
17 issues until we see what the Supreme Court decides to do?

18 Mr. Shumate, do you have a view on that?

19 MR. SHUMATE: Your Honor, if I may, I'd like  
20 Mr. Pezzi to answer that question.

21 THE COURT: Oh, that's fine.

22 MR. SHUMATE: Okay.

23 THE COURT: Yes, sir.

24 MR. PEZZI: Good morning, Your Honor.

25 THE COURT: Good morning.

1 MR. PEZZI: So, it is obviously impossible to  
2 predict how the Supreme Court is going to handle that petition  
3 but I do think it would be prudent if the Supreme Court does  
4 grant the petition, for Your Honor to await further guidance  
5 from the Supreme Court. We expect that if the Supreme Court  
6 resolves that case, the issues at a minimum will affect these  
7 proceedings and it is very possibly that they'd be completely  
8 dispositive.

9 Our understanding is that that petition will be  
10 fully briefed in a matter of days and is to be considered at  
11 the Court's February 16th, 2018 conference. Beyond that, of  
12 course, I can't speculate about how the Court will react.

13 THE COURT: Well, you haven't requested a stay of  
14 Judge Alsup's injunction in connection with that cert  
15 petition, is that right?

16 MR. PEZZI: That is correct, we are pursuing  
17 appellate relief both in the Ninth Circuit and in the  
18 Supreme Court. We have not sought a stay pending appeal.  
19 As explained in the cert petition, the reason for that, at  
20 least in part, is consistent with the reasons laid out in the  
21 decision in this case is to try to avoid abrupt swings back  
22 and forth in a short time but we have not sought a stay and do  
23 not intend to seek a stay pending appeal.

24 THE COURT: I see. Thank you very much.

25 Mr. Shumate, do you have any objection to the

1 student from the Yale Law School speaking on any of the issues  
2 at this hearing?

3 MR. SHUMATE: Not at all, Your Honor.

4 THE COURT: Okay. Thank you.

5 What's the position of the plaintiffs with regard to  
6 the question I just asked the Government?

7 MS. TUMLIN: Thank you, Your Honor. Karen Tumlin  
8 for the National Immigration Law Center on behalf of the  
9 Batalla Vidal Plaintiffs.

10 THE COURT: Yes.

11 MS. TUMLIN: And I think Ms. Rosado will address  
12 this for the States.

13 Your Honor, if the Supreme Court grants the petition  
14 for cert, we do not believe a stay of proceedings is  
15 appropriate in this matter for a couple of reasons.

16 First and foremost, the legal claims and legal  
17 theories of the plaintiffs in this case and in this courtroom  
18 diverge and are different from those that are pending before  
19 the Supreme Court right now in the UC Regents case.

20 Secondly, the nationwide injunction that is in place  
21 from Judge Alsup's ruling excludes and does not cover all of  
22 the plaintiffs, at least in the Batalla Vidal matter. We have  
23 plaintiffs who have been unable to apply for DACA who have  
24 either aged in or met the educational requirements since  
25 September the 5th, they're not covered by Judge Alsup's order



1 and they need relief now, Your Honor.

2 THE COURT: All right. Thank you.

3 Yes.

4 MS. ROSADO: Thank you, Your Honor. Lourdes Rosado  
5 on behalf of the Plaintiff States.

6 We agree with the position of the Batalla Vidal  
7 Plaintiffs. We would also add that, Your Honor, the Supreme  
8 Court would also benefit from a complete record of the  
9 proceedings in this case in making a difficult decision  
10 regarding this key legal question. Thank you.

11 THE COURT: All right. Thank you.

12 I had one other question. I was puzzled that there  
13 was a desire on the part of the parties for this Court to  
14 render an opinion on an interlocutory appeal from its decision  
15 on jurisdiction for the Second Circuit to review that  
16 promptly. I think when the Second Circuit denied the mandamus  
17 petition, they also suggested, the panel suggested that this  
18 Court rule on any application for interlocutory appeal and  
19 then last Friday I received a letter saying that the parties  
20 had no intention to seek interlocutory relief on the  
21 jurisdictional issue.

22 Now, this may seem a minor matter but when I'm asked  
23 by the parties and by the circuit to do something, I take it  
24 very seriously. We put a lot of effort into it. We ruled, we  
25 granted the application and then the application was in effect

1 withdrawn and I'm just wondering what caused everybody to have  
2 a change of heart on this subject.

3 Can you tell me in 25 words or less?

4 Yes, sir.

5 MR. PEZZI: Your Honor, just to clarify, I think  
6 there may have been a miscommunication or misinterpretation of  
7 the letter that plaintiffs filed. We have not withdrawn our  
8 petition for an interlocutory appeal. We filed it, we  
9 explained why the Second Circuit should grant the petition.  
10 In response to our petition, plaintiffs suggested in their  
11 opposition that the Second Circuit may wish to hold the  
12 petition in abeyance pending Your Honor's forthcoming decision  
13 on the preliminary injunction motion and in our reply brief we  
14 didn't object to that proposal but proceedings are continuing  
15 in the Second Circuit and the petition remains before them and  
16 it is our position that it should be granted whenever they  
17 consider it.

18 THE COURT: So, let me understand, when the  
19 plaintiffs indicated that they would like the circuit to  
20 forbear on a interlocutory review on jurisdiction, you then  
21 responded that you didn't object to their position; what does  
22 that mean?

23 MR. PEZZI: I think we --

24 THE COURT: How does anyone divine what your actual  
25 position is based on that statement?

1 MR. PEZZI: To be clear, Your Honor, it may have  
2 been a bit more than we didn't object. I actually think we  
3 agreed with them that the most efficient course moving forward  
4 would be for the Second Circuit to hold that petition in  
5 abeyance pending Your Honor's decision on the preliminary  
6 injunction motion that we're here for today based on the  
7 timing of how this all played out. Ultimately, of course, it  
8 is up to the Second Circuit and they haven't yet decided.

9 THE COURT: Anything else on that? We don't have to  
10 spend a lot of time on it.

11 MS. TUMLIN: Just briefly, plaintiffs' position was  
12 always we oppose the interlocutory review here when we were in  
13 the District Court, also at the Second Circuit. Our position  
14 has been consistent, Your Honor.

15 THE COURT: Yes, ma'am.

16 MS. ROSADO: Your Honor, on behalf of the Plaintiff  
17 States, we similarly did not have any change of heart, we've  
18 always felt that this case should proceed forward.

19 THE COURT: Well, I wouldn't want to put the  
20 Second Circuit to the trouble of deciding a motion for an  
21 interlocutory -- to grant the motion for an interlocutory  
22 appeal if there's a belief on the part of the parties that  
23 perhaps we should just go ahead with the underlying motions  
24 and resolve them here. So, if there's any way that you can be  
25 more lucid in stating your views to the Second Circuit so that

1 they don't have to do any work that they don't need to, please  
2 feel free to do so, I'm sure they would deeply appreciate it.  
3 I've sat by designation on the circuit a number of times and  
4 there have been occasions when the circuit has been concerned  
5 about the lack of clear understanding of the parties'  
6 positions in certain matters, so I just mention that to you  
7 going forward.

8 Now, we're going to start with the argument on the  
9 application for a preliminary injunction. I take it we'll  
10 start with the makers of the motion. Who will be speaking on  
11 that issue?

12 MR. CHEN: I will be, Your Honor.

13 THE COURT: Okay. So, just step right up to that  
14 microphone over there. I'm giving your side 15 minutes. I've  
15 read all of the materials. I've also read all of the  
16 decisions in the California case and I've been keeping abreast  
17 of what everyone has been doing. It's been a challenge.

18 Go ahead.

19 MR. CHEN: Absolutely, Your Honor. The Batalla  
20 Vidal and the state plaintiffs will split their time evenly on  
21 the motion for preliminary injunction with the Batalla Vidal  
22 Plaintiffs going first.

23 I would like to start on the arbitrary and  
24 capricious claim and focus on two particular reasons why the  
25 agency action is arbitrary and capricious; first, the

1 Government's failure to acknowledge any reliance interests in  
2 this matter and, second, its failure to set out any rationale  
3 with clarity in the termination memo.

4           So, on to the reliance interests. The arbitrary and  
5 capricious standard forbids an agency from upending the lives  
6 of nearly 700,000 individuals without publicly reckoning with  
7 that decision and where there are serious reliance interests  
8 at stake an agency is required to provide a more substantial  
9 justification but the Government here abruptly reversed its  
10 course with cursory statements and ignores the interests of  
11 people like Plaintiff Batalla Vidal who has enrolled in  
12 LaGuardia Community College in reliance on scholarships that  
13 he qualifies for through DACA and Plaintiff Fernandez who  
14 purchased a home and relies on a job possible through DACA to  
15 afford a mortgage. In fact, individuals across the country  
16 have structured their lives around the possibility of being  
17 considered for the DACA program.

18           THE COURT: Didn't Secretary Duke simply take the  
19 Attorney General's reference on the question of illegality and  
20 implement the recision based on that and the likelihood that  
21 there would be litigation in the Southern District of Texas  
22 which would result in a nationwide injunction against DACA?  
23 Those are the two prongs I think of what the Government has  
24 indicated. Isn't this sufficient to justify the action that  
25 the Secretary took?

1 MR. CHEN: We don't think so, Your Honor. Regarding  
2 the reliance interests, I think the Supreme Court has  
3 essentially said that when the stakes are this high, an agency  
4 can't simply upend lives with such opaque statements as the  
5 Government has been giving and in fact we don't think that the  
6 Government has set out any rationale with clarity, not the  
7 legal determination rationale, nor the litigation risk  
8 rationale upon which they rely. This leaves really the Court  
9 to guess at the underlying theory behind the agency action  
10 which is exactly what administrative law forbids.

11 So, if you take a look at the termination  
12 memorandum, Your Honor, it provides only a single opaque  
13 sentence stating that three documents were considered and that  
14 it is "clear" that DACA should be terminated but this  
15 memorandum unfortunately is devoid of analysis and  
16 explanation, it is forcing the Court to essentially connect  
17 the dots between the documents that were considered and the  
18 conclusion that was drawn.

19 THE COURT: Yes, but can't litigation risk supplant  
20 all other arguments if it's a serious risk? We already have  
21 the record from the Southern District of Texas and the Fifth  
22 Circuit on the DAPA case with the nationwide injunction.  
23 Wouldn't that be enough to -- and we have a letter from the  
24 Attorneys General of eleven states telling the Attorney  
25 General that they're going to -- threatening to amend their

1 complaint in Texas; isn't it likely that that would be  
2 sufficient, a sufficient risk to justify what the Secretary  
3 felt disposed to do?

4 MR. CHEN: Well, Your Honor, there's several  
5 responses. The first is that, as the Court has already noted  
6 in its November 9th order, the litigation rationale the  
7 Government provides is a post hoc rationalization that this  
8 Court shouldn't accept, but even if the Court were to accept  
9 that rationale, we believe that it relies on a decision on a  
10 separate program without application, without reasoning its  
11 application to DACA and, Your Honor, out of respect for the  
12 Court's order on timing, I'd like to hand it over to my  
13 colleague, Ms. Tumlin, to address notice and comment.

14 THE COURT: Sure, please.

15 MS. TUMLIN: Thank you, Your Honor.

16 So, turning to plaintiffs' notice and comment claim  
17 under the APA, the Duke Memo radically altered the lives of  
18 not only the named plaintiffs but upwards of 700,000 putative  
19 class members by mandating an end to DACA without input from  
20 the public as required by Congress.

21 Now, certainly a president or a cabinet officer can  
22 change a policy of a prior administration, they just have to  
23 do so following the boundaries set by Congress. Our position  
24 is that was not done here. And you can think of --

25 THE COURT: What should they have done?

1 MS. TUMLIN: They should have, if they wanted to not  
2 go through notice and comment, they should have issued a  
3 memorandum that absolutely retained discretion at the hands of  
4 USCIS adjudicators when they are greeted with an incoming DACA  
5 application. That's really the hallmarks of what you need in  
6 order to have a general statement of policy, which is what the  
7 Government claims, it has to fall in the category of  
8 memorandum that sends a message to a government adjudicator,  
9 take this in mind as guidance but at the end of the day take a  
10 certain action if you feel that it's right.

11 THE COURT: So, if as a result of today's argument  
12 the gentlemen from the Justice Department go back and advise  
13 the new Secretary of Homeland Security that the Secretary  
14 should rescind the prior decision and to implement what you  
15 have suggested, this case would be over?

16 MS. TUMLIN: Well, a couple of responses to that  
17 quickly, Your Honor; the proper remedy if the Court believes  
18 we're likely to succeed on our notice and comment claim is, of  
19 course, we're here for provisional relief, is to enjoin the  
20 Duke Memorandum. That would bring us back to the world before  
21 September 5th. I don't know if the case would ultimately go  
22 away, I think we'd proceed to final relief.

23 THE COURT: I see. Go ahead.

24 MS. TUMLIN: Okay. So, Your Honor, when we're  
25 looking at the notice and comment claim, the first place that



1 the Court needs to look, number one, is at the text of the  
2 Duke Memorandum itself. Turning only to the four corners of  
3 that memorandum, there are at least four instances of binding  
4 mandatory language repeated over and over that agents are to  
5 reject certain applications. That doesn't leave the door open  
6 to discretion. Judge Alsup found in his -- when he reviewed  
7 this document as well that it was plainly binding language.

8           Secondly, the Court is directed to look at the  
9 actual agency practice in applying the memo and that also is  
10 patently clear here. We have evidence, and it is at Exhibit P  
11 of our motion for preliminary injunction, that 4,000 DACA  
12 renewals came in after October the 5th but before October  
13 the 18th. They were all rejected categorically and solely  
14 based on notice and comment. Those two things alone are  
15 sufficient to find in favor of the plaintiffs on our notice  
16 and comment claim here.

17           Finally, Your Honor, I would like to point out that  
18 the Alsup order on notice and comment which denied, in fact  
19 dismissed the claim of the plaintiffs in the UC Regents case  
20 makes a couple of critical errors. First, it looks not only  
21 at the text of the Duke Memorandum but attempts to argue that  
22 because the prior predecessor policy did not go through notice  
23 and comment, that notice and comment is not required here.  
24 There is no such carve-out under the APA. Instead, what this  
25 Court is faced with is looking at the text of the Duke

1 Memorandum and its actual applications.

2 THE COURT: Okay. Thank you.

3 MS. TUMLIN: Okay.

4 THE COURT: Mr. Pezzi.

5 MS. TAYLOR: Your Honor.

6 THE COURT: Oh, sorry.

7 MS. TAYLOR: Your Honor, the State Plaintiffs would  
8 like a few minutes to address some additional items.

9 With regard to our notice and comment claim in  
10 particular, I'd just like to say one thing that you're likely  
11 to hear from Mr. Pezzi or his colleagues which is that there  
12 might be some alternative form of relief that might be  
13 available to DACA recipients somewhere within the Department.  
14 That is simply irrelevant, frankly, to the notice and comment  
15 analysis. It also strains credulity to think that there is  
16 any meaningful relief that might be available to DACA  
17 grantees.

18 It is irrelevant to the APA analysis because the  
19 question is not whether there might be some form of relief  
20 somewhere else within the agency, the question is with regard  
21 to this rule and in the application of this rule whether the  
22 agency officials retain any discretion when they receive DACA  
23 applications and the answer is no.

24 As my colleague, Ms. Tumlin pointed out, the agency  
25 will reject every single DACA application without any sort of

1 individualized discretion.

2           It also strains credulity to think that when we're  
3 dealing with 700,000 young people that somehow the agency has  
4 some future plan to provide them some sort of relief that has  
5 not been made clear to us yet. If that were the case, that  
6 would be clear from the face of the termination memo or from  
7 some other statements of the Department and it simply doesn't  
8 exist here.

9           So, I urge you, Your Honor, to look carefully at  
10 this claim that somehow the agency will later change the rule  
11 or will offer some other form of relief and that that has  
12 bearing on their notice and comment claim.

13           THE COURT: All right. Is anyone at plaintiffs'  
14 table going to discuss the information use policy and how that  
15 affects the Court's consideration of this proposed injunction?

16           MS. TAYLOR: So, I think the information use policy,  
17 I'm not sure we were planning on addressing the information  
18 use policy but if you have particular questions.

19           THE COURT: Well, we've got five or six DACA  
20 plaintiffs here who provided a great deal of information in  
21 connection with their applications some of which might be used  
22 for the purpose of future immigration enforcement actions, I'm  
23 sure they'd like to know and certainly I'd like to know.

24           MS. TAYLOR: That's true, Your Honor. I think that  
25 goes to the Batalla Vidal's procedural due process claim which

1 they will be addressing in response to the motion to dismiss.

2 THE COURT: Okay. Thank you.

3 MS. TAYLOR: Thank you, Your Honor. With that, I  
4 would turn the microphone over to Lourdes Rosado to argue  
5 regarding our substantive APA claims.

6 THE COURT: Yes, briefly.

7 MS. ROSADO: Very briefly, Your Honor, thank you. I  
8 just want to spend a moment talking about what the States'  
9 reliance interests are in the DACA program and then offer an  
10 alternative ground for finding that the termination was  
11 arbitrary and capricious and that is that the defendants'  
12 proffered reasons for the termination that were indeed  
13 pretextual.

14 So, briefly on our reliance interests, the States  
15 and their residents also have a significant reliance interest  
16 in the DACA program because grantees are integrated into our  
17 communities. State and municipal agencies employ DACA  
18 grantees to serve the public, teach our children, to take care  
19 of the sick. We have many DACA grantees who are members of  
20 mixed status families that include U.S. citizens and legal  
21 permanent residents and many of those folks rely on the DACA  
22 grantee to be the family's primary wage earner and provide  
23 health insurance and if those individuals are no longer able  
24 to do that, it is going to fall on the States to step in.

25 THE COURT: And you're from the State of?

1 MS. ROSADO: New York, Your Honor.

2 THE COURT: All right. Do you have a sense, have  
3 you done any kind of investigation or survey as to how many  
4 individuals, not just the grantees, the DACA grantees but also  
5 their families would be affected if the DACA recipients of the  
6 DACA grant that has been used in the past were to be  
7 terminated, how many people would be affected in New York?  
8 Forget about the rest of country.

9 MS. ROSADO: We have some preliminary numbers but  
10 I'm sure those numbers are small compared to the full impact.  
11 I would say, first of all, we have an expert report in the  
12 States' submissions that includes an assessment of the impact  
13 of all of the DACA grantees losing their health insurance by  
14 state, what impact that will have on the States having to make  
15 up for that loss of insurance on behalf of the grantee and  
16 their family members.

17 We don't have really good numbers I don't think and  
18 won't for a while as to how many people are going to lose  
19 their jobs and then how many families are going to be impacted  
20 by that but those are the kinds of serious concerns that we  
21 have and why we do have a reliance interest here, a reliance  
22 interest that was absolutely not considered by the defendants  
23 in terminating that program.

24 THE COURT: Have you considered how this would  
25 affect medical facilities, hospitals?

1 MS. ROSADO: Absolutely, Your Honor.

2 THE COURT: Research facilities and universities?

3 MS. ROSADO: Yes, Your Honor, we have DACA grantees  
4 who work and study in many of our public universities which  
5 are major research centers for the country. DACA grantees  
6 work in our communities, particularly in our underserved  
7 communities providing medical care. We have DACA grantees who  
8 serve as teachers in Teach of America, again going into some  
9 of our lowest performing schools. So, this is going to have  
10 an impact.

11 In addition, Your Honor, the States also shape their  
12 regulatory schemes to allow the DACA grantees, for example, to  
13 become doctors and nurses, to get driver's licenses so they  
14 can get to their job, so that they can fully participate in  
15 our communities and it is going to be a grave loss to the  
16 States if they're not able to do so.

17 Just to spend one minute to flag the pretext  
18 argument, Your Honor, because that is an independent ground by  
19 which this Court can find that the decision was arbitrary and  
20 capricious; there are at least four bodies of evidence I would  
21 point the Court to in our papers that support a finding that  
22 the proffered reasons for the termination that DACA is  
23 unlawful because the executive branch lacks the authority to  
24 promulgate such a program and keep it running and the  
25 purported litigation risk.

1 First is that we've seen some shifting rationales  
2 from defendants as to why the program was terminated and the  
3 chosen method for termination. One example, because I'm  
4 running out of time, in the motion to dismiss the defendants  
5 state for the first time that the termination was a policy  
6 judgment by the then Acting Secretary, that immigration  
7 decisions of this magnitude should be left to Congress. This  
8 is completely a post hoc rationale, it was no where in the  
9 administrative record.

10 Second, Your Honor, President Trump has publicly  
11 acknowledged on many occasions his authority to continue the  
12 DACA program. It started on the night of the termination when  
13 he Tweeted that he would, quote, revisit the issue if Congress  
14 didn't pass appropriate legislation, and most recently in the  
15 last couple of weeks we've continued to see Tweets from the  
16 President that he's ready, willing and able to continue with  
17 DACA in exchange for border security issues or building the  
18 wall and all of this directly contradicts the proffer in the  
19 administrative record that the executive lacks the authority.

20 Third, we have also seen unsubstantiated statements  
21 about DACA grantees that are also further evidence of pretext  
22 and that is that the Attorney General, for example, has made  
23 comments that DACA-s steal jobs and commit crimes, all of  
24 which are untrue.

25 And, finally, there are also many statements of

1 animus towards Latino immigrants by the President and others  
2 in his administration that are further evidence of pretext and  
3 my colleague, Ms. Melody, will go a little further into that  
4 when she discusses our equal protection claim.

5 THE COURT: All right. Thank you.

6 MS. ROSADO: Thank you, Your Honor.

7 THE COURT: Thank you very much.

8 MR. PEZZI: Good morning, Your Honor.

9 THE COURT: Why don't you stand over there. No one  
10 will hurt you.

11 MR. PEZZI: Happy to, Your Honor.

12 THE COURT: Welcome.

13 MR. PEZZI: Great to be here, Your Honor. Thanks  
14 for having me. I heard two primary rationales from my friends  
15 on the other side as to why this decision was arbitrary and  
16 capricious. The first was about reliance interests and the  
17 second was about the clarity of the decision memo.

18 On the issue of clarity, I think the Supreme Court  
19 has squarely foreclosed the argument that because with the  
20 benefit of hindsight an agency's decision could have been  
21 written more clearly, that that is a basis to set it aside  
22 under the APA. In Bowman Transportation and even in the State  
23 Farm case that sets out the arbitrary and capricious standard,  
24 it is very clear that even an agency decision that is not a  
25 model of clarity, as long as the agency's path can be



1 reasonably discerned, it should be upheld by the court. I  
2 think that standard is easily satisfied here notwithstanding  
3 the clarity concern. The parties have submitted to Your Honor  
4 hundreds of pages of briefs about the precise rationales  
5 offered by the Secretary, we think they're sufficient, they  
6 think they're insufficient but there's no clarity problem.

7 THE COURT: Well, if the Attorney General's position  
8 that the DACA program is unconstitutional, illegal, why  
9 wouldn't he have instructed that the program be terminated  
10 forthwith, because the Government cannot impose a program that  
11 is unconstitutional, and he argues and you argue that one of  
12 the reasons why the Attorney General and the Secretary felt  
13 that it was important to terminate it at some point was the  
14 likelihood that if the case were reviewed by the Southern  
15 District of Texas, it would impose an injunction against the  
16 program based on its illegality; why is there this  
17 unwillingness to do what the Attorney General says is clearly  
18 illegal, to deal with something that is clearly illegal? Is  
19 this out of sympathy? I don't know that the Government  
20 operates out of sympathy, according to this Attorney General.

21 MR. PEZZI: Your Honor, the Department of Homeland  
22 Security after receiving the Attorney General's letter and  
23 relying on the Attorney General's conclusion and the  
24 Department of Homeland Security's conclusion that the program  
25 was unlawful decided to institute an orderly wind-down over a

1 two and a half year period. I'm not aware of any authority,  
2 and plaintiffs certainly haven't cited anything, that concerns  
3 about a program's legality required the Government to  
4 immediately and completely shut down the program on that very  
5 day. I think an orderly wind-down of the program based on  
6 concerns about its legality is consistent with the law and the  
7 Constitution. Had the Department continued the program  
8 indefinitely, that might raise some problems that Your Honor  
9 is suggesting but I don't think that that's what we have here  
10 and I actually think this dovetails directly into what I had  
11 intended to say about the reliance arguments that my friends  
12 on the other side make.

13           It is clear that to the extent there are any legally  
14 cognizable reliance interests here, and if the program is  
15 unlawful I don't think there are, but if there are legally  
16 cognizable reliance interests at stake, they were accommodated  
17 by the Department of Homeland Security's decision to wind the  
18 program down in an orderly fashion.

19           Now, a program of enforcement discretion like this  
20 one that was always intended to be, in President Obama's  
21 words, a temporary stopgap measure, I think certainly cannot  
22 induce any reasonable reliance interests beyond the stated  
23 two-year periods of these DACA grants. And the Department of  
24 Homeland Security did not truncate those two-year periods,  
25 anyone who had DACA as of September 5th can continue for the

1 full duration of those two-year periods and, indeed, those  
2 whose DACA status was about to expire imminently got an  
3 opportunity for an additional two-year renewal.

4 THE COURT: That's interesting, let me just pursue  
5 that for a moment. How about those who applied to have their  
6 DACA status extended but the Homeland Security didn't receive  
7 the applications until after the -- what was it, the September  
8 5th deadline?

9 MR. PEZZI: So, there was an October 5th deadline.

10 THE COURT: October 5th.

11 MR. PEZZI: That's right. If your DACA status was  
12 going to expire after or during this period, you had until  
13 October 5th to get an application to the Department of  
14 Homeland Security. As Your Honor knows from the last time I  
15 was here in Brooklyn, plaintiffs and others pointed to some  
16 issues with how the Postal Service had handled some of those  
17 applications and even how the Department of Homeland Security  
18 had processed those applications and those issues were  
19 remedied by a voluntary process that was not required by law  
20 in our view, but the Department of Homeland Security decided  
21 for individuals who sent their application three weeks early  
22 and it got lost in the post office in Chicago, we're going to  
23 let that individual re-submit.

24 THE COURT: How many people were covered by that  
25 voluntary act of grace?

1           MR. PEZZI: I don't have a precise number to offer  
2 you unfortunately, Your Honor. I will say, regardless of the  
3 significance of those issues in the October 5th deadline,  
4 those issues have now been further overtaken by events, of  
5 course, even setting aside the decision by the Department of  
6 Homeland Security to fix the problem, pursuant to the  
7 injunction that is in place in the Northern District of  
8 California, anyone can renew today. If you have ever had DACA  
9 status before, you can submit a renewal request and it is  
10 being processed by the Department of Homeland Security. So,  
11 if you missed the October 5th deadline and even if you missed  
12 the October 5th deadline and the process set forth by the  
13 Department of Homeland Security was somehow insufficient to  
14 cure the problem, those individuals can and presumably are now  
15 renewing.

16           In fact, to my knowledge, at least several of the  
17 individuals named in plaintiffs' papers have submitted renewal  
18 requests. I'm not exactly sure the status of all of those  
19 requests but, in other words, regardless of the merits of such  
20 a claim, I think those issues have now been overtaken by  
21 events.

22           On the notice and comment issues that were raised, I  
23 think it is a simpler issue than is presented by the other  
24 side. There's a Second Circuit case called Noel v. Chapman  
25 that analyzes a set of facts that is remarkably similar to

1 what we have here, it is about the recision of a policy of the  
2 former Immigration and Naturalization Service by which they  
3 previously as a matter of grace had treated more favorably  
4 certain requests for voluntary departure and a memo comes down  
5 from the INS to the local New York district and says, hey, the  
6 way you're treating those applications is inconsistent with  
7 how we want them treated and from now on exercise general  
8 case-by-case discretion instead of granting all of the  
9 requests that meet certain criteria.

10           The Second Circuit rejected the idea that that sort  
11 of ruling needed to go through notice-and-comment rulemaking.  
12 That was not a -- there was actually a split on that issue in  
13 some courts across the country. There's an Eastern District  
14 of Pennsylvania decision that plaintiffs rely on that  
15 explicitly refuses to follow the Second Circuit's authority  
16 but, of course, Your Honor is bound by that Second Circuit  
17 decision and I think that resolves the question of whether the  
18 recision of DACA is a general statement of policy for purposes  
19 of this Court at least.

20           In any event, even if we're wrong about all of that,  
21 I don't think Your Honor can enter the injunction that  
22 plaintiffs are requesting on a notice and comment theory  
23 because their theory would compel the conclusion that DACA  
24 itself was unlawful for failure to go through notice and  
25 comment, of course DACA did not go through notice and comment,

1 and an equitable remedy like an injunction is not available in  
2 that circumstance.

3 THE COURT: Oh, and the cases that say that are  
4 what?

5 MR. PEZZI: There is a Fourth Circuit case that says  
6 precisely that thing, Your Honor, forgive me, it is not cited  
7 in our brief in this case but in the District of Maryland case  
8 we did cite it, it is 48 F.3d 1331, it is a 1995 decision of  
9 the Fourth Circuit called Chen Zhou Chai and it holds quite  
10 logically, separate and apart from the authority I think it is  
11 a logical proposition consistent with general equitable  
12 principles that if plaintiffs are asking this Court to enter  
13 an order that would confirm the thing that they are seeking is  
14 itself unlawful, it would be inappropriate to enter such an  
15 order.

16 THE COURT: So, your position is that the initial  
17 creation of this program was unlawful and that therefore I  
18 should review that in order to find that the recision was not  
19 unlawful?

20 MR. PEZZI: No, I don't think that's our position,  
21 Your Honor. I think Your Honor may agree or disagree with the  
22 Attorney General's conclusion that the program is unlawful,  
23 the Secretary of Homeland Security's conclusion.

24 THE COURT: I get to make my own decision about  
25 that, is that right? Are you saying I do or I don't? Because

1 he seems to think I don't. I read his comments at The  
2 Heritage Foundation and he seems to think that the courts  
3 cannot have an opinion because he ruled that it was unlawful.  
4 That's what I read. I don't know what you read.

5 MR. PEZZI: Certainly --

6 THE COURT: He didn't bring that up with me. He's  
7 not here, is he?

8 MR. PEZZI: The Attorney General is not here, Your  
9 Honor.

10 THE COURT: It's better that he's not.

11 MR. PEZZI: Absolutely Your Honor may have an  
12 opinion and may disagree with the Attorney General and the  
13 Fifth Circuit about the question of DACA's illegality.  
14 However, I don't think --

15 THE COURT: Has the Fifth Circuit ruled on DACA's  
16 illegality too?

17 MR. PEZZI: The Fifth Circuit has affirmed an  
18 injunction of not just the DACA policy but also the expanded  
19 DACA policy.

20 THE COURT: But you're overstating what the Fifth  
21 Circuit did. I mean I know what the Fifth Circuit did but  
22 they did not terminate the DACA program.

23 MR. PEZZI: They did --

24 THE COURT: What they did was they returned it to  
25 its prior iteration, instead of a three-year period for the

1 DREAMers, it went back to being a two-year period for the DACA  
2 recipients.

3 MR. PEZZI: That is right, Your Honor, but every  
4 reason offered by the Fifth Circuit, more or less every reason  
5 offered by the Fifth Circuit in that opinion applies directly  
6 to DACA and the Fifth Circuit opinion really makes that clear.  
7 I mean the plaintiffs in that case hadn't yet challenged the  
8 original DACA policy directly, so the holding in that case  
9 didn't strike down the original DACA policy.

10 THE COURT: Right.

11 MR. PEZZI: But I think it is quite clear from a  
12 fair reading of that opinion that if the same question were  
13 before the Fifth Circuit as to the legality of the original  
14 DACA policy, it would have come out the exact same way.

15 THE COURT: So, you decided to appeal from Judge  
16 Alsup's decision to both the Supreme Court and the Court of  
17 Appeals for the Ninth Circuit, so you decided in effect not to  
18 let the issue percolate through the intermediate courts but to  
19 jump in effect the Ninth Circuit and go directly to the  
20 Supreme Court which has only happened a couple of times in the  
21 past, as I understand.

22 MR. PEZZI: That's right.

23 THE COURT: You weren't interested in what the Ninth  
24 Circuit had to say.

25 MR. PEZZI: Well, we do have a pending appeal before



1 the Ninth Circuit.

2 THE COURT: Yes, but you're up in the Supreme Court  
3 so you must care more about the Supreme Court and you don't  
4 want to hear from the Ninth Circuit potentially. I'd like to  
5 hear from the Ninth Circuit.

6 MR. PEZZI: I think the --

7 THE COURT: You like hearing from the Fourth  
8 Circuit.

9 Go ahead.

10 MR. PEZZI: The rationale offered by the Solicitor  
11 General's Office in that filing, Your Honor, I think makes a  
12 lot of sense which is that this is an issue that is almost  
13 certain to reach the Supreme Court at some point and there's  
14 twelve cases in six different courts, so that's the argument  
15 offered. Maybe the Supreme Court will find it persuasive,  
16 maybe they will not. I don't think that -- no issue that Your  
17 Honor has to decide today turns on whether that was an  
18 appropriate decision or not.

19 But returning to the question of Your Honor's view  
20 of the legality of the DACA policy, again, I think even if  
21 Your Honor disagrees, even disagrees strongly with the  
22 Attorney General's view and the Fifth Circuit's view, that  
23 doesn't mean that the Acting Secretary's decision was  
24 irrational or arbitrary and capricious. I think it was  
25 certainly rational in the face of the adverse precedent

1 against the Government with respect to a materially  
2 indistinguishable policy to institute an orderly wind-down of  
3 the DACA policy. As to the --

4 THE COURT: Why was it unnecessary to go through the  
5 APA process before deciding to terminate the program?

6 MR. PEZZI: The APA has a textual exception for  
7 general statements of policy that are not required to go  
8 through notice-and-comment rulemaking. DHS has issued many  
9 deferred action policies over the years almost never without  
10 going through notice-and-comment rulemaking and the Supreme  
11 Court has described a general statement of policy as a  
12 statement issued by an agency to advise the public  
13 prospectively of the manner in which the agency proposes to  
14 exercise a discretionary enforcement power.

15 That's exactly what we have here. The recision memo  
16 institutes an orderly wind-down of the DACA policy and a  
17 return to a more traditional, truly case-by-case discretionary  
18 consideration of deferred action.

19 THE COURT: Does size matter in this situation? Does  
20 the range of consequences of a determination by the Secretary  
21 that affects literally millions of individuals, I'm talking  
22 about the DACA recipients, their families, their employers,  
23 their educational institutions, their hospitals, does that put  
24 a special burden on the Secretary to be more fulsome in  
25 considering the potential risks of engaging in this kind of a

1 termination of this policy?

2 MR. PEZZI: The short answer is no, Your Honor.  
3 There is no special burden for particularly important or  
4 significant agency decisions.

5 THE COURT: You don't think a court should establish  
6 that there is --

7 MR. PEZZI: I think the Supreme Court --

8 THE COURT: -- as a matter of law?

9 MR. PEZZI: The Supreme Court has decided that  
10 courts do not have the authority to raise the bar provided  
11 that Congress set out in the Administrative Procedure Act. In  
12 a case called Vermont Yankee the Supreme Court holds that the  
13 procedures set forth in the APA are the maximum procedures  
14 that courts are authorized to impose and they specifically  
15 reject the argument that because the court in that decision  
16 was faced with an issue of, I think it was great public import  
17 was the language the Supreme Court used, that some higher  
18 standard applies or some additional procedures are  
19 appropriate.

20 THE COURT: What about litigation risk, isn't that  
21 just a backdoor to evading APA review of decisions to rescind  
22 rules that you don't like? And there's always a litigation  
23 risk. We get thousands of cases every year in this court,  
24 civil cases, and around the country there must be thousands of  
25 APA review cases, we don't just rule on these cases based on a

1 litigation risk, litigation is part of the process, and to do  
2 so might be arbitrary on the part of the Court.

3 Are you saying that this was a decision based on  
4 litigation risk because of the Southern District of Texas and  
5 the Fifth Circuit that you didn't want to take a risk that  
6 some court somewhere else in the country would view this  
7 differently from let's say Judge Alsup or some judge in  
8 Maryland?

9 MR. PEZZI: I don't think relying in part on  
10 litigation risk is any sort of end run about the APA's  
11 requirements. The Court, of course, still reviews whether any  
12 agency decision is arbitrary and capricious and I don't think  
13 there's anything at all irrational about relying on litigation  
14 risk particularly in the somewhat unusual facts presented here  
15 wherein a materially indistinguishable policy had already been  
16 enjoined on a nationwide basis, that decision was affirmed by  
17 a Court of Appeals and that decision too was affirmed by a 4-4  
18 Supreme Court. I recognize that Your Honor is not --

19 THE COURT: Which was not precedential in nature.

20 MR. PEZZI: Absolutely, does not set any precedent.

21 THE COURT: I'd like to add that because a 4-4  
22 decision does not have the effect of precedent.

23 MR. PEZZI: Your Honor is certainly not bound by  
24 that Supreme Court decision. The Department of Homeland  
25 Security --

1 THE COURT: I call that a Supreme Court non-decision  
2 because they didn't reach a conclusion.

3 MR. PEZZI: Respectfully, Your Honor, that may be  
4 true as to parties other than the Department of Homeland  
5 Security but that was very much a decision that bound the  
6 Department of Homeland Security and binds them to this day.  
7 That was why the Department had no choice but to rescind the  
8 DAPA policy and the expanded DACA policy that -- it has no  
9 differences whatsoever other than a three-year rather than a  
10 two-year renewal window, the age cap and the date of entry  
11 requirements were different.

12 THE COURT: All right. Thank you.

13 MR. PEZZI: Thank you.

14 THE COURT: Is there anything you'd like to say  
15 about the motion to dismiss?

16 MR. PEZZI: I'm happy to address whatever Your Honor  
17 thinks is most efficient, the motion to dismiss arguments  
18 either after plaintiffs raise more arguments about that or I  
19 can talk about it now. Since Your Honor wanted to hear about  
20 the preliminary injunction first, there are some issues unique  
21 to the preliminary injunction motion that I think are worth  
22 getting out quickly.

23 THE COURT: Quickly.

24 MR. PEZZI: Even if Your Honor disagrees with the  
25 Government on all of the preliminary injunction factors,

1 thinks there's a likelihood of success on the merits, balance  
2 of equities all favors plaintiffs, even if Your Honor comes to  
3 that conclusion, I still think a preliminary injunction under  
4 the circumstances that are faced with us today would be  
5 inappropriate. I don't think plaintiffs can show irreparable  
6 harm that is actual or imminent in light of an injunction  
7 being entered by the Northern District of California that  
8 provides them nearly all of the relief they are seeking here  
9 and certainly the thrust of the relief that is the focus of  
10 their papers.

11           The Supreme Court's decision in Winter I think  
12 requires a showing of irreparable harm and I think any harm  
13 here, certainly again as to the majority of their papers, is  
14 very speculative and far off in light of the injunction  
15 entered by Judge Alsup and the fact that the Department isn't  
16 seeking a stay of that decision pending appeal.

17           So, you know, all of the reliance interests we heard  
18 about and the importance of the program, they may all file  
19 renewal requests now and presumably are being advised to do so  
20 by their counsel and so I think that's important to Your  
21 Honor's consideration.

22           THE COURT: Let me ask you a question having nothing  
23 to do with the arguments here today necessarily, but you have  
24 a new Secretary of Homeland Security, all right, and has the  
25 Secretary of Homeland Security, who's been nominated by the

1 President and confirmed by the Senate, had the opportunity to  
2 reconsider the decision of his Duke in connection with DACA?

3 MR. PEZZI: I can't speak to what is in the mind of  
4 the current Secretary of Homeland Security. I'm not aware of  
5 any intent to reconsider this decision and we, of course,  
6 represent the Department of Homeland Security.

7 THE COURT: Well, that's why I asked you.

8 MR. PEZZI: We are continuing to defend that  
9 decision in court and I have no reason to think that that is  
10 going to change any time soon. I will say the new Secretary  
11 on this issue testified before Congress about two weeks ago  
12 and she testified, and I believe it was under oath, that  
13 regardless of the outcome of this litigation, whether there's  
14 legislation in Congress, whether this program continues or  
15 not, that DACA recipients are not likely to be a priority of  
16 the Secretary of Homeland Security but beyond that, I don't  
17 want to speak out of turn with respect to what's going on in  
18 her head other than to say, of course, we represent them and  
19 we are here defending a decision that was made on  
20 September 5th and we expect to continue to do so.

21 THE COURT: All right. Thank you.

22 MR. PEZZI: Thank you, Your Honor.

23 THE COURT: All right. On the Government's motion  
24 to dismiss, let me hear -- if you would like to reply, that  
25 would be fine.

1 MR. PEZZI: That works for me.

2 THE COURT: On the opposition to the motion to  
3 dismiss, is there anything?

4 MS. ROSADO: I'm sorry, Your Honor, are you asking  
5 whether we are prepared to do a rebuttal to the preliminary  
6 injunction motion?

7 THE COURT: No. This is about the Government's  
8 motion to dismiss the case and I'm wondering whether anyone  
9 would like to speak to that. We've had a wide-ranging  
10 discussion but I'm just wondering whether there's anything  
11 more that the plaintiffs would like to say about the  
12 Government's motion to dismiss and whether there are any  
13 particular aspects of the motion that has been made that the  
14 plaintiffs would like to bring to the Court's attention?

15 MS. MELODY: Good morning, Your Honor, I'm Colleen  
16 Melody from the State of Washington. I'm going to briefly  
17 address the zone of interests argument that's made in the  
18 Government's 12(b)(6) motion and also the equal protection  
19 issues in this case.

20 Very briefly on the zone of interests, the  
21 Defendants and the Plaintiff States all agree that the INA is  
22 the applicable statute with which to evaluate the zone of  
23 interests argument. There are three ways that the Plaintiff  
24 States, all of them, fall within the zone of interests of the  
25 INA. The first is that we're all employers and the INA



1 contains detailed statutory and regulatory provisions  
2 governing how we may recruit and employ immigrants. So,  
3 because we all employ or want to employ the most qualified  
4 people, our interests are regulated by the INA.

5 Second, we operate colleges and universities and  
6 colleges and universities rely on the employment provisions in  
7 the INA in order to do their work, to hire faculty, to hire  
8 graduate students who can teach and do research, many graduate  
9 students require employment authorization in order to do  
10 clinical research, to work in labs, to teach other students  
11 and that is regulated interests for purpose of the INA.

12 And third, every state operates benefit systems that  
13 are specifically regulated by the INA. The Fifth Circuit  
14 decision on which the Attorney General exclusively relied in  
15 terminating DACA speaks exactly to this issue when it found  
16 that each state, in that case all of them were regulated by  
17 the INA for purposes of the zone of interests.

18 There's a specific federal statute that requires  
19 states to determine benefits eligibility with reference to  
20 immigration status, we can't get out of that, we are regulated  
21 in that way and so we all fall into the zones of interests for  
22 purposes of credential standing.

23 Moving to the equal protection arguments, Your  
24 Honor, the evidence of animus towards Latino immigrants, even  
25 on a record with limited discovery here, is truly remarkable.

1 The Government's motion to dismiss should be denied and the  
2 Plaintiff States' motion for preliminary relief on that ground  
3 should be granted for two reasons.

4 First, the record contains significant direct and  
5 circumstantial evidence of defendants' animus statements  
6 toward Latino immigrants and animus infected the decision to  
7 terminate DACA.

8 THE COURT: The animus that you're talking about,  
9 that wasn't animus by the Secretary of Homeland Security, was  
10 it?

11 I mean is there any evidence of animus on the part  
12 of the Secretary, the Acting Secretary or the current  
13 Secretary of Homeland Security against Latinos, Mexicans,  
14 other foreigners who have availed themselves of the DACA  
15 program?

16 MS. MELODY: Not directly, Your Honor, but that  
17 argument is a strawman for two reasons; one is that as to the  
18 equal protection claim, Acting Secretary Duke's decision  
19 making or intent are not the only intentions relevant, that's  
20 true for APA too. This Court has already found that Attorney  
21 General Sessions -- correctly found that Attorney General  
22 Sessions was a decision-maker as to DACA based on defendants'  
23 representations.

24 THE COURT: Representations to me I would add at our  
25 first hearing.

1 MS. MELODY: Twice, Your Honor.

2 THE COURT: Well, with all due respect, that's not  
3 the current position of the Government, that it was the  
4 Secretary who made the decision and it was not the Attorney  
5 General.

6 MS. MELODY: Respectfully, no, Your Honor, in  
7 footnote 16 of their brief, in their 12(b)(6) brief they make  
8 the same concession again to this Court in writing.

9 THE COURT: Okay.

10 MS. MELODY: So, Secretary Duke's intentions are not  
11 the only ones that matter legally and also as a matter of  
12 common sense and the Federal Rules of Evidence. We have  
13 statements from the President himself the day that DACA was  
14 terminated through Twitter, through White House press releases  
15 owning and taking responsibility for the decision; the  
16 Attorney General himself announced the termination of DACA on  
17 live television, and those statements cannot be separated from  
18 the decision itself when Secretary Duke relied on those  
19 statements and those decisions in her decision.

20 And so, I would point you to footnote 16 of the  
21 Government's brief on 12(b)(6) where they say, yes, they were  
22 involved but the Court should treat that as a legal fiction.  
23 There's no basis, there's no citation how that could be  
24 dispositive, particularly in a constitutional equal protection  
25 analysis.

1           And so, with respect to discriminatory intent then,  
2       this Court conducts a sensitive, factual analysis under the  
3       very familiar Arlington Heights standard where the Court looks  
4       at all of the factors together and those are going to be  
5       several years now of a drumbeat of anti-Latino statements made  
6       by the President and his administration, that's going to be  
7       the overwhelming and conceded disproportionate impact that the  
8       termination of DACA will have on Latinos and the tremendously  
9       unusual process by which this decision was reached.

10           To say that litigation risk is something that this  
11       administration considers in making decisions is not consistent  
12       with the path of litigation that we've seen this  
13       administration pursue in many of its most controversial and  
14       sort of well publicized policies.

15           It's also very unusual for the administration to  
16       throw aside years and years of considered legal analysis and  
17       issue a one-page letter reaching conclusory legal decisions  
18       about a program affecting this many folks.

19           Notably, Your Honor, the Court -- excuse me,  
20       notably, the defendants don't even address or dispute the idea  
21       that the President and the Attorney General's statements  
22       constitute evidence of animus. Instead, they just ask the  
23       Court to disregard them relying exclusively on a presumption  
24       of regularity but a presumption of regularity in this context  
25       would be tantamount to a presumption of no liability ever no

1 matter what any policy maker or elected official said. That  
2 would apply a lower standard of constitutional rigor to the  
3 President of the United States than applies to any mayor or  
4 city council member anywhere in this country when courts  
5 across this country conduct the Arlington Heights analysis.  
6 That cannot be the law.

7 Finally, Your Honor, instead of taking on or  
8 addressing the animus-based arguments, the Government has  
9 asked to reframe this as a selective enforcement argument.  
10 This Court has twice found correctly that this is not a  
11 selective enforcement claim.

12 Most recently in the January 8th ruling granting  
13 defendants' motion to certify the Court stated: This is not  
14 an enforcement decision or a nonenforcement decision, it is a  
15 non-nonenforcement decision.

16 That's right. It is a categorical, across the board  
17 policy decision affecting 700,000 people. That is not the  
18 kind of individualized prosecute this individual, not  
19 prosecute this one kind of decision to which selective  
20 enforcement claims speak.

21 The Court's November 9th order on the motion to  
22 dismiss for 12(b)(1) issues says the same thing: "This  
23 affirmative decision to constrain DHS's prosecutorial  
24 discretion cannot be analogized to an exercise of  
25 prosecutorial discretion." The Court was right then and still

1 is.

2 So, at the end, Your Honor, after setting aside all  
3 of these legal excuses for why we shouldn't consider the  
4 President and Attorney General's public statements, we're left  
5 with a question: Would this same decision have been made in  
6 the absence of a discriminatory motive? Or stated another  
7 way: Would the same outcome have been reached if the group of  
8 affected young people had been children and young adults from  
9 Norway instead of children and young adults primarily from  
10 Mexico?

11 THE COURT: Do those people tend to be white?

12 MS. MELODY: My understanding is yes, Your Honor.

13 THE COURT: Well, I hate to make a statement based  
14 on my own observations; I was in Norway last year and most of  
15 the people I ran into were white. So, unlike your Secretary  
16 of Homeland Security whose name is what? What's her name?

17 MR. PEZZI: The current Secretary is Kirstjen  
18 Nielsen.

19 THE COURT: Kirstjen Nielsen. I just wish to point  
20 out that my observation was that most of the people that I ran  
21 into in Norway when I was there were white.

22 MS. MELODY: And that's the analysis that the Court  
23 conducts, would the outcome on the total evidence in this  
24 record be the same. The answer is no and the Government's  
25 motion to dismiss should be denied and the States' motion for

1 preliminary relief on the equal protection claim should be  
2 granted.

3 THE COURT: Okay. Thank you.

4 MS. MELODY: You're welcome.

5 THE COURT: All right.

6 Mr. Pezzi, do you want to speak to that?

7 Oh, is there something else?

8 MS. TUMLIN: Yes, Your Honor.

9 THE COURT: Briefly.

10 MS. TUMLIN: Yes, I'm going to address the  
11 procedural due process claim on the motion to dismiss, Your  
12 Honor.

13 THE COURT: Go ahead.

14 MS. TUMLIN: So, the plaintiffs' procedural due  
15 process claim is very simple, it is that the plaintiffs, DACA  
16 recipients, have the right to have their application for  
17 renewal adjudicated, processed under the terms of the Duke  
18 Memorandum. Instead what has occurred, and what we have  
19 adequately pled, is the procedures put in place by USCIS to  
20 implement that memorandum were arbitrary, a significant break  
21 from ABC practice and did not actually comport with basic  
22 notions of due process.

23 Let me point out just two clear cut examples and the  
24 reason I want to do that, Your Honor, is because it speaks not  
25 only to the sufficiency of the pleadings here but to the clear

1 ongoing irreparable harm that have come to these DACA  
2 recipients, New Yorkers, today.

3           So, two cases that are in our pleadings; first,  
4 Fernando Hernandez Cordero, he is one of those individuals who  
5 did his ever best, sent in his renewal application, it was  
6 received at 6:01 p.m. on October the 5th but USCIS had already  
7 checked the mail for that day, denied his application.

8           After some discussion here, and also this being  
9 reported in the press, the procedures were changed. He  
10 reapplied. We raised this case as early as November the 7th.  
11 His DACA expired on December 21st, Your Honor, and currently  
12 his application for renewal is still pending. That alone is  
13 reason that we have adequately pled this claim.

14           Secondly, Jonathan Morin Juarez, also a member of  
15 Make the Road New York, also in our pleadings; he mailed his  
16 application for renewal on September 28th, 2017, trying to  
17 follow the rules of the one month scramble that was set in  
18 place by the Duke Memorandum. That was received on October  
19 the 10th. Again, he was denied his right to have that  
20 adjudicated. The reason it was late was well documented  
21 postal delays by the U.S. Postal Service. He also has  
22 reapplied but his DACA expired on December 28, 2017.

23           For these reasons alone, the process set up by the  
24 Government has deprived plaintiffs and members of Make the  
25 Road New York of a protected liberty interest in having their



1 application adjudicated.

2           Make no mistake, they're not saying they have a  
3 protected right to get DACA, to have it granted to them.  
4 They're simply asking for the opportunity to be considered  
5 under the process put in place by the Duke Memorandum, Your  
6 Honor.

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8           (Continued on next page.)

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1 THE COURT: Let me just go back to the equal  
2 protection question. Is it plaintiff's position that because  
3 Mr. Trump, when he was a candidate, made incendiary,  
4 insensitive, irresponsible, and untrue statements about  
5 Mexicans that the Trump administration could never rescind  
6 DACA now that he's the president?

7 MS. TUMLIN: My colleague is going to speak to the  
8 equal protection question.

9 MR. CHEN: I can answer that question, your Honor.  
10 I think the equal protection inquiry looks to the  
11 totality of the circumstances and depends upon the facts of  
12 each challenged action.

13 So, for example, under the *Arlington* framework, we  
14 look to whether there are differences in terms of the  
15 statements made, contemporary statements, and the irregularity  
16 of the process. So it may differ depending upon the action  
17 that President Trump has taken.

18 However, in this particular instance, there is clear  
19 evidence that is consistent and long running from  
20 President Trump's beginnings as announcing his presidency up  
21 until when he has become president, and then just several  
22 weeks ago when he made those comments.

23 So, as to this particular action, there is a clear  
24 connection between President Trump's and Attorney General  
25 Sessions' comments and remarks as well as the irregularities,

1 the way that the DACA termination was conducted, that go to  
2 the equal protection analysis.

3 THE COURT: Thank you.

4 MR. CHEN: If I may really answer your question  
5 about the information sharing policy that was posed earlier?

6 So just to clarify. The information sharing policy  
7 goes to the Batalla Vidal's plaintiffs arbitrary and  
8 capricious claim. In that sense, the plaintiffs here have  
9 also relied upon the information sharing policy that the  
10 Government presented.

11 Now, the Government's position is that that  
12 information sharing policy hasn't changed but, your Honor, we  
13 believe that's incorrect. There are textual changes in the  
14 policy. So, for example, prior to September 5th, the  
15 Government had represented that DACA applicants' information  
16 would be protected from disclosure to ICE. And that now has  
17 changed to that the information policy would generally would  
18 not be proactively provided. Nor is there any inclusion of  
19 protections for family members and guardians which it was a  
20 protection prior to September 5th.

21 So those are clear changes in the information policy  
22 and individual applicants have certainly relied upon this  
23 assurance given the fact that they are individuals who may be  
24 vulnerable to deportation. They came out of the shadows and  
25 applied for DACA with the understanding that the Government

1 would not then use this policy that is meant to benefit them  
2 in order to find them and put them in removal proceedings,  
3 your Honor.

4 THE COURT: That's a policy and policies can be  
5 changed. Is there any obligation on the part of the federal  
6 government to expunge or not consider information which has  
7 been provided in order to fulfill the Government's other  
8 responsibilities under the law?

9 MR. CHEN: No, not necessarily, your Honor.

10 I want to clarify our argument on reliance interest.  
11 I think this goes back to our original argument about DACA  
12 termination itself. Plaintiffs' view is not that the  
13 Government could never terminate DACA or never change the  
14 information policy, but rather, given the significance of  
15 reliance at stake, as the Supreme Court has said, the agency  
16 must provide more substantial justification when it is  
17 reversing its position.

18 So as to the information policy, if the Government  
19 wanted to change that policy, it needed to provide some  
20 rationale or some reasoned decision making. The Government  
21 here has not done so and, in fact, has not even acknowledged  
22 that it has changed its policy which is arbitrary and  
23 capricious, your Honor.

24 THE COURT: Thank you.

25 Mr. Pezzi, let me just ask you a question about

1 something you said earlier.

2 You indicated earlier that the DHS had no choice but  
3 to rescind the DACA policy in light of the *Texas v.*  
4 *United States* litigation. Now, are you saying that the  
5 defendants were legally compelled to rescind DACA in the  
6 Attorney General's view, or that it may -- that this was a  
7 discretionary decision to do so in light of the assessment of  
8 the litigation risk. Which was it? Were you compelled or was  
9 it discretionary?

10 MR. PEZZI: We were not compelled in the sense that  
11 there was no order from the Court in Texas that required the  
12 original DACA policy to be wound down. In the face of the  
13 litigation risk presented by those proceedings, and the  
14 Department of Homeland Security's determination about the  
15 legality of the policy, it was decided to wind down the  
16 program. And our burden in this case, and in APA cases, show  
17 that that decision was at least rational.

18 THE COURT: So you had 11 attorneys general threaten  
19 to amend their complaint, and that if they amended their  
20 complaint the Judge Hanen.

21 MR. PEZZI: I believe it was Judge Hanen.

22 THE COURT: Judge Hanen down in Texas, who is a  
23 district judge like me, might rule and issue an injunction  
24 that the Circuit might or might not affirm.

25 MR. PEZZI: That's --

1 THE COURT: And if the Supreme Court might or might  
2 not affirm. So there's a lot of steps there. So you chose to  
3 view that as manifest destiny, if I might use a term that I  
4 learned in elementary school about how big this country is.

5 MR. PEZZI: Your Honor --

6 THE COURT: You really care about the other states  
7 or their residents down there in Washington these days? Do we  
8 count? Does California count? Does the Eastern District of  
9 New York count? That's rhetorical, don't answer.

10 MR. PEZZI: Understood, your Honor.

11 I think it was at least rational to -- I think it  
12 was an absolutely reasonable prediction about how the  
13 proceedings in Texas were going to play out. Judge Hanen was  
14 bound by the Fifth Circuit's decision which had struck down a  
15 materially and distinguishable policy. The next Fifth Circuit  
16 panel to review Judge Hanen's decision would have been also  
17 bound by prior Fifth Circuit precedent. And so, it would have  
18 required some sort of -- you would have to come to the  
19 conclusion that it was irrational to think that the way the  
20 proceedings played out in Texas with the materially and  
21 distinguishable policy would have played out the same way and  
22 I don't think that was.

23 THE COURT: Did you appeal to the Supreme Court on  
24 this concept of a nationwide injunction in that case?

25 MR. PEZZI: On the nationwide injunction issue,

1 specifically, I don't think that was a focus of the cert  
2 petition in the Texas proceedings.

3 THE COURT: It wasn't your petition, it was the  
4 other side's petition, right? Who petitioned the Supreme  
5 Court?

6 MR. PEZZI: The Government filed a cert petition in  
7 response to the Fifth Circuit's decision in Texas.

8 THE COURT: The Government filed it?

9 MR. PEZZI: That's right, yes. I think that's  
10 right.

11 THE COURT: What did the Fifth Circuit do?

12 MR. PEZZI: The Fifth Circuit affirmed the  
13 nationwide injunction that had been entered by Judge Hanen of  
14 the expanded DACA and the DAPA policies, and the Government  
15 appealed that decision to the Supreme Court. When the  
16 Government lost at the Supreme Court, and the judgment was  
17 affirmed in the Circuit, they actually brought a rehearing  
18 petition to have it reconsidered upon the confirmation of the  
19 ninth justice and that petition was denied.

20 So it is not the case, and this appears in some of  
21 plaintiffs' papers that the Government sort of rolled over.  
22 That was an issue that was fought vigorously, unsuccessfully  
23 ultimately, and Department of Homeland Security was pound by  
24 that judgment.

25 THE COURT: We have now have a different government.

1           MR. PEZZI: Certainly there has been a change in  
2 administration.

3           THE COURT: I think that's a fair statement. It's a  
4 different government.

5           MR. PEZZI: Your Honor, if I can speak to the  
6 information sharing issue.

7           THE COURT: Briefly.

8           MR. PEZZI: I think it actually is very important  
9 for your Honor, and frankly, everyone in this courtroom to be  
10 aware. Here is a quote from the Citizenship and Immigration  
11 Services.

12          THE COURT: From whom?

13          MR. PEZZI: From USCIS, Citizenship and Immigration  
14 Services.

15          THE COURT: Go ahead.

16          MR. PEZZI: "The information sharing policy has not  
17 changed in any way since it was first announced, including as  
18 a result of the September 5, 2017, memo starting a wind down  
19 of the DACA policy."

20                I don't know how the Government can be clearer than  
21 that. The information sharing policy, in fact, has not  
22 changed. The adverbs "proactively" and "generally" that my  
23 friends on the other side express so much concern about do not  
24 actually appear, and have never appeared to my knowledge on  
25 the actual instructions to submit a DACA request. Nor do they



1 appear on current instructions.

2 So when you go on the USCIS website, there is now a  
3 page devoted to Judge Alsop's injunction and it says, Here is  
4 the process to apply for a renewal as a result of the  
5 Judge Alsop's injunction. The instructions there use the same  
6 language that plaintiffs claim that we have abandoned or  
7 changed, we have not.

8 To the extent there was confusion about the prior  
9 policy, USCIS reacted to that and put out that clear statement  
10 that I just read to make sure there was no confusion going  
11 forward.

12 THE COURT: The information use policy remains same?

13 MR. PEZZI: That is correct, your Honor.

14 THE COURT: And can you provide the Court with the  
15 policy. Can you file the policy with the Court so I know  
16 exactly what the Department of Homeland Security says the  
17 policy is, so that there would be no question in this  
18 litigation about the policy that DHS is following.

19 MR. PEZZI: Absolutely willing to get those  
20 instructions on file and I think that will resolve the issue.

21 THE COURT: That would be very helpful and I deeply  
22 appreciate your assistance.

23 MR. PEZZI: On the procedural due process claim.

24 THE COURT: Yes, go ahead.

25 MR. PEZZI: I think my friends on the other side

1 essentially just confirmed that they do not have, or at least  
2 no longer have, any viable procedural due process claim. They  
3 confirmed what I had suspected which is that all of the  
4 affected individuals have submitted renewal applications now  
5 either as a result of DHS's voluntary decision to treat the  
6 October 5th deadline with some flexibility or as a result of  
7 Judge Alsop's injunction.

8 But if their claim is they want those requests to be  
9 adjudicated, and that's what I heard my friends on the other  
10 side saying, they are being processed by all accounts and they  
11 conceded appropriately they don't have any right, certainly  
12 not a constitutional right, to have those granted or  
13 considered in any certain way. If they're being considered,  
14 there's no claim. There's no money damages claim, for  
15 example, at issue because it took a little bit longer than  
16 they would have like for those to be processed. So I think  
17 that resolves the procedural due process claim among other  
18 reasons.

19 THE COURT: Okay. Did you want to talk about --  
20 well, I think Mr. Shumate was going to say something about  
21 class certification.

22 Do you have something else you'd like to say?

23 MR. PEZZI: I was just going to say very briefly on  
24 the animus claim if you don't mind, your Honor.

25 I do think the implications of the plaintiff's

1 theory of their equal protection claim are quite remarkable  
2 based on the fact that there is a statistically significant  
3 disparate impact of this decision on Latinos. If plaintiffs  
4 are right that the President's statements, the vast majority  
5 of which were, you know, on the campaign before he took the  
6 oath of office, plaintiffs are right that those are sufficient  
7 to make a triable issue over whether the Constitution of the  
8 United States was violated on an equal protection theory.

9 That would mean at any time any agency within the  
10 Executive Branch, and it would not be limited to the  
11 Department of Homeland Security because they claim the theory  
12 has nothing to do with the Elaine Duke. Any time a Government  
13 takes a decision with a statistically disparate impact on  
14 Latinos that the Equal Protection Clause has been violated and  
15 I just think that's a remarkable theory.

16 THE COURT: Well, the fact of the matter is, that  
17 the statements that were made during the election cycle were  
18 extremely volatile and many of them completely erroneous and  
19 they were intended to have a political outcome. And there was  
20 no concern on the part of the candidate as to how that would  
21 affect the groups that were being attacked.

22 And then the activity of the administration after  
23 January 20th of 2017 could be construed as having confirmed  
24 the bias of the leadership. So it's not just an ad hoc  
25 comment that was overheard on an open mic. It was a

1 recurring, redundant, drum beat of anti-Latino commentary that  
2 was unjustified by facts to a tremendous extent.

3 So it's not just a comment. It's not just that  
4 somebody at INS said something derogatory about Mexicans, this  
5 came from the top. This isn't ordinary. In this country, in  
6 over 230 years, it's not ordinary. It's extreme, it's  
7 recurring, it's vicious. It's a different kind of commentary.  
8 It's not what we see from our leaders, hopefully.

9 And so, you're asking to wipe the slate clean and  
10 treat this situation like any other decision. How is it  
11 possible to do that in my position as an Article III judge who  
12 was sworn to uphold the Constitution of the United States?  
13 How do I do that without taking into account the commentary,  
14 which is so injurious and harmful and unfair to particular  
15 ethnic groups, by the person who sits in the Oval Office.  
16 That's the question.

17 And I'm not sure what the answer is, and I'm not  
18 making an answer, but it's not a simple question. It's not a  
19 question sort of ignoring a few offhand comments that were  
20 made by some bureaucrat in Washington or in New York on a bad  
21 hair day. There's a lot more going on here potentially. So I  
22 don't accept the premise that this is something we can just  
23 ignore. This is something we must consider, and how we end up  
24 is the question.

25 MR. PEZZI: Your Honor, I took that same oath and

1 it's something that I take very seriously. I think even if  
2 your Honor is inclined to consider those issues in analyzing  
3 plaintiffs' equal protection claim and I'm not sure that you  
4 do, in fact, I don't think you do. None of the statements are  
5 about rescission of DACA. None of the statements are by  
6 Elaine Duke who made the decision in question. When the  
7 President has spoken about DACA recipients, he has been  
8 generally supportive.

9 THE COURT: I appreciate that. Thank you.

10 MR. PEZZI: Thank you, your Honor.

11 THE COURT: Do we need to talk about class  
12 certification?

13 Why don't we just have a brief statement from the  
14 plaintiffs and then from the Government and that will close it  
15 out.

16 MS. ROSADO: Your Honor, if I may? I wanted to --  
17 during one of your earlier questions I was negligent in  
18 alerting the Court to the fact that my boss is here, the  
19 New York State Attorney General.

20 THE COURT: I've been looking at him the whole time.

21 MS. ROSADO: So you've been waving. I just didn't  
22 want to get in trouble with my boss for not letting you know.

23 THE COURT: There have been other occasions when  
24 I've wanted your boss to be here, but at this time I'm  
25 delighted to see you here, Mr. Schneiderman. Thank you for

1 joining us. And your assistant is doing an excellent job. So  
2 next time you're reviewing --

3 MS. ROSADO: Thank you, your Honor.

4 THE COURT: Yes, okay.

5 Go ahead.

6 MR. CHEN: Thank you, your Honor.

7 Just a few brief comments on the motion for class  
8 certification. So, as a threshold matter, the Batalla Vidal  
9 Plaintiffs maintain that this court has authority to issue a  
10 nationwide relief without certifying class. And so,  
11 plaintiffs are moving for class cert out of prudence, merely  
12 out of prudence for plaintiffs because the Government  
13 continues to assert that nationwide relief is inappropriate  
14 without a class. They have made that same argument up to the  
15 Supreme Court on the certiorari petition in the California  
16 cases.

17 So nothing in our argument is meant to constrain the  
18 Court's authority in any way, but rather just to gift the  
19 Court greater comfort in fashioning broader relief if the  
20 Court finds it to be necessary.

21 So I can quickly go over the two proposed  
22 alternatives for a motion for class certification --

23 THE COURT: Go ahead.

24 MR. CHEN: -- and address even of them in turn.

25 So the first one, just to recap, is to modify the

1 class definition to exclude individual plaintiffs in parallel  
2 litigation. And the second is to maintain the broader class  
3 that we ask the Court to certify and allow members to opt out.

4 So on to the definitional approach. I'm going to  
5 address the Government's arguments, and essentially, the  
6 Government makes an argument about how there's an interference  
7 concern with parallel litigation. But that interference  
8 concern is overblown, your Honor.

9 So the Batalla Vidal Plaintiffs are certifying a  
10 class of only individual plaintiffs. So DACA recipients who  
11 had DACA as of September 5, 2017, and those who may -- who  
12 qualify, or may qualify, for DACA under the 2012 guidance.

13 This does not interfere with the other cases because  
14 those don't specifically interfere with the institutions  
15 litigating in parallel actions since they also have  
16 institutional interest.

17 So, for example, the State of California asserts  
18 state-specific injuries of, for example, losing tax revenue  
19 and the Regents University of California claimed loss of  
20 enrollment, so those are injuries and they have standing  
21 specific to their institutional interests.

22 But moreover, there are, as the Government claims,  
23 about 12 cases challenging the DACA termination and the court  
24 s across the country have been comfortable with matters  
25 proceeding simultaneously. So no court has found a problem

1 with the potentially overlapping the plaintiffs that the  
2 Government says is unacceptable in this case. So because the  
3 Government here is citing a theoretical problem that's not a  
4 reason to deny class certification here, your Honor.

5 THE COURT: Well, but going back to my first  
6 question.

7 If the Supreme Court accepts the California case for  
8 decision, it wouldn't be necessary for me to rule on the class  
9 cert issue at that point. I could stay proceedings, right?

10 MR. CHEN: Well, your Honor, on just the class  
11 certification issue, we don't think that -- we maintain that  
12 it's not necessary to rule on it in order to grant relief.  
13 Our position is certainly that the Court should continue to --  
14 should grant the preliminary injunction on a nationwide basis.

15 THE COURT: Thank you very much. Mr. Shumate, you  
16 get the last word.

17 MR. SHUMATE: Thank you, your Honor.

18 May it please the Court. I'll be very brief on the  
19 class certification question.

20 Our position is that the Court should deny the  
21 motion for a class certification with respect to a nationwide  
22 class. I don't think the plaintiffs have really grappled with  
23 the implications of what it would look like for the Court to  
24 grant a nationwide class and then enter a final judgment.  
25 Because the plaintiffs are seeking a (b)(2) class action, if



1 the Court were to enter a final judgment in this case that  
2 would bind all class members, including absent class members,  
3 and it would preclude the plaintiffs in other cases from  
4 bringing their claims before those courts.

5 So if the Court, for example, were to enter a final  
6 judgment, or the Second Circuit were to enter a final  
7 judgment, that would preclude the plaintiffs in the other  
8 cases from bringing their own individual claims. I think they  
9 haven't grappled with the fact that a (b)(2) class action is a  
10 mandatory class action. All members of the class are bound by  
11 that. And they haven't grappled with the Walmart case.

12 So I just want the Court to keep that in mind that  
13 we don't think it would be appropriate in this case to certify  
14 a (b)(2) class that would necessarily interfere with other  
15 cases going around the courts. I think the Court is well  
16 aware there are 12 cases. So I just wanted the Court to keep  
17 that in mind.

18 THE COURT: Thank you. I just have one additional  
19 question for the Assistant Attorney General. I wouldn't want  
20 his trip here to be for naught.

21 The question really is will the administration  
22 continue to honor DACA benefits that are being granted during  
23 the pendency of Judge Alsop's injunction?

24 MR. RADLER: I would defer to my to my colleague.

25 THE COURT: You're going to disappoint me.

1           MR. RADLER: My career colleagues are really  
2   terrific at the department to rely on to do the heavy lifting  
3   among these cases.

4           THE COURT: I hope you can hold on to them.

5           MR. PEZZI: Your Honor, I wish I could offer a more  
6   concrete answer to that question. It is something that I and  
7   others have thought about. Until we get a decision, whether  
8   it's from the Ninth Circuit or the Supreme Court or both, it's  
9   impossible to know exactly what the lay of the land is going  
10   to look like for the DACA policy.

11           So, for example, one possibility is the Supreme  
12   Court enters an opinion that says not only is DACA unlawful  
13   but it needs to be stopped immediately. If something like  
14   that happened that might affect how the Department of Homeland  
15   Security considers those issues.

16           But more importantly --

17           THE COURT: If the Supreme Court leaves the details  
18   to the administration, and doesn't require that you terminate  
19   the DACA program forthwith, what is the intention of the  
20   administration with regard to these individuals who are  
21   applying for continuation of their DACA status as a result of  
22   the injunction?

23           MR. PEZZI: Your Honor, although I'm unable to make  
24   a firm representation about that because a final decision  
25   won't be able to be made until the litigation proceeds I can

1 say, and I think this is important, in the Solicitor General's  
2 filings with the Supreme Court, the reason the Government did  
3 not seek a stay of Judge Alsop's injunction was to avoid  
4 abrupt swings back and forth in our nation's immigration  
5 policy and how this particular policy is carried forth.

6 So I can certainly assure you that the Department of  
7 Homeland Security is aware of the issues and is something it  
8 takes very seriously. Beyond that, we'll have to wait and see  
9 how the litigation precedes and someone at the Department of  
10 Homeland Security will ultimately make that decision.

11 THE COURT: Yes, ma'am.

12 MS. TUMLIN: Your Honor, very briefly to close on  
13 this point for plaintiffs.

14 Your Honor, the plaintiffs in this courtroom today,  
15 the young people from New York who have DACA, who brought this  
16 case here, respectfully ask the Court to not wait to issue a  
17 ruling on the preliminary injunction motions in this case for  
18 three reasons.

19 First, the individual plaintiffs, of course, deserve  
20 prompt resolution of their claims. And secondly, and this is  
21 incredibly important, your Honor, neither the deliberations on  
22 Capitol Hill nor Judge Alsop's current injunction, the relief  
23 provided is neither adequate nor is it stable for these young  
24 people.

25 It is not adequate for a couple of reasons. First,

1 as we discussed today, we have different legal theories and  
2 claims brought by these plaintiffs that are not up and pending  
3 before the U.S. Supreme Court. There are plaintiffs that are  
4 left out of Judge Alsop's order including the young people  
5 who, after the magic date of September the 5th aged into the  
6 program for the first time and are absolutely excluded.  
7 They've brought their case here and should not be forced to  
8 wait.

9 And really importantly, there's a very different  
10 record developed in this case on those legal claims and legal  
11 theories with evidence and the Supreme Court, whatever it  
12 decides, deserves to have these plaintiffs, that record,  
13 before it.

14 Additionally, your Honor, the Circuit appears that  
15 it may be waiting for this court to rule expeditiously on the  
16 pending interlocutory appeal. And what I want to say, your  
17 Honor, as a matter of what is before this court is no matter  
18 what happens, and none of us have a crystal ball in what's  
19 happening in Congress or the various courts across this  
20 country. We know what's happening in this courtroom in the  
21 Eastern District of New York. We know that Carolina and  
22 Antonio and Martin and all of the plaintiffs and members of  
23 Make The Road New York whose lives are built around DACA, and  
24 who are integral to this community, are seeking relief from  
25 this court, have fully brought the matter to the Court's

1 attention, and -- but they want more than anything is to have  
2 some stability that they can go on and continue to contribute  
3 to their New York community and continue fulfilling their  
4 dreams, your Honor.

5 THE COURT: Thank you. Thank you, everyone.

6 (WHEREUPON, this matter was adjourned.)

7  
8 \* \* \*

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